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NO. 57820-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Appellant/Cross-Respondent,

v.

MACPHERSON CONSTRUCTION & DESIGN, LLC

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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BRIEF OF RESPONDENT

"No scenario results in a rate increase. All scenarios present an anticipated decrease."

- Donna Wilson, Mutual of Enumclaw Product Development Specialist in her May 24, 2001 letter to the Insurance Commissioner.

In stark contrast to Mutual of Enumclaw's ("MoE") rate filings with the Insurance Commissioner and the unequivocal statement cited above, the entirety of MoE's claim that the transition to the Simplified program would not trigger the Liberalization Clause is based on after-the-fact, incomprehensible mathematical calculations belatedly engineered to support its litigation position.[1] All of the contemporaneous evidence presented by MacPherson, LLC compels a different conclusion, i.e., that the Liberalization Clause has been triggered as a matter of law. In fact, the ultimate fact MoE relies upon to prove its position is submitted without citation – "Therefore, regardless of any changes to the total projected aggregate premium receipts, rate increases to some individual policy holders was

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[1] To this end, MacPherson, LLC relies principally upon documents and testimony of Rudy VanVeen and Donna Wilson – the two MOE employees in charge of the transition from the Pre-Simplified to the Simplified program. MOE, on the other hand, attempts to rebut Mr. Van Veen and Ms. Wilson's documents and testimony with the declaration of Cori Medrano, an underwriter who had no involvement in the transition program and whose only connection to the issue is as the current custodian of MacPherson, LLC's underwriting file.

expressly contemplated by both MoE and the OIC."[2] Similarly, the great portion of the confusing "facts" MoE cites as its "evidence" are entirely unsupported by the record. A particularly egregious example of the evidentiary liberty taken by MoE is found in the "Appendix" made part of MoE's Appellant's Brief. This "Appendix" is nothing more than a soliloquy (most of it without citation to the record or other authority) on the "insurance history" necessary for this Court to decide the issue in MoE's favor.

In contrast to MoE's arguments, MacPherson, LLC relies on the deposition testimony of MoE witnesses and the documentary evidence contained in the record to prove as a matter of law that the MoE Policy was liberalized to provide coverage as broad as that provided by the Simplified insurance program. In sum, the MoE Policy's Liberalization Clause has been triggered as a matter of law. MoE fails to offer facts sufficient to warrant reversal. It is proper for this Court to affirm the trial court's judgment in favor of MacPherson, LLC.

I. SUMMARY OF ARGUMENT

In the Fall of 2000, MacPherson, LLC renewed a comprehensive general liability ("CGL") insurance policy issued by

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[2] Brief of Appellant at p. 10.

MoE.[3] This CGL policy was written on an antiquated 1973 policy form. During the year-long period this CGL policy was in force, MoE submitted forms and filings to Washington's Insurance Commissioner (sometimes referred to herein as "OIC") seeking to transition its liability insurance program from the 1973 forms to the "modern" 1986 Commercial General Liability forms (which MoE's CR 30(b)(6) designee testified would have provided coverage for the arbitration award at issue).[4] The OIC approved MoE's use of the 1986 CGL forms on August 1, 2001 – undisputedly during the period MacPherson, LLC's policy was in effect.

The representations contained in MoE's submissions to the OIC (the best and most reliable evidence in the record) repeatedly declared that the transition to the 1986 CGL forms would not result in an increase in premium charges to its policyholders (in fact, MoE repeatedly represented that the transition would actually result in a decrease in premiums to its policyholders). MoE concluded that the premiums would decrease after informing the Insurance Commissioner that it had "re-rated its entire book of business" as part of the transition.

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[3] The MoE policy was originally issued to MacPherson Construction & Design, Inc. However, on January 1, 2000, the named insured on this policy was changed to MacPherson Construction & Design, LLC – Respondent/Cross-Appellant and the Inc.'s successor company.

[4] CP 1013 – 1018.

MoE's transition to the 1986 CGL program broadened the coverage previously provided by the 1973 form, insofar as the 1986 form provides liability coverage for damage to, and arising out of, subcontractor work. Under an express provision contained in MacPherson, LLC's insurance policy in force when this transition took place, MacPherson, LLC was entitled to the broader coverage afforded by the 1986 forms that were approved for use by the OIC during the 2000 – 2001 policy period. Specifically, MacPherson, LLC's insurance policy contained a "Liberalization Clause," which is the subject of this portion of the instant appeal. The Liberalization Clause contained in the primary policy reads as follows:

> In the event any filing is submitted to the insurance supervisory authorities on behalf of the Company and:
>
> (a) the filing is approved or accepted by the insurance authorities to be effective while this policy is in force or within 45 days prior to its inception; and
>
> (b) the filing includes insurance forms or other provisions that would extend or broaden this insurance by endorsement or substitution of forms, without additional premium,
>
> the benefit of such extended or broadened insurance shall inure to the benefit of the insured as though the endorsement or substitution form had been made.

MoE failed to give effect to this provision, denying coverage to MacPherson, LLC based on the language of the 1973 CGL form.

Here, all requirements of the Liberalization Clause are satisfied. Based on the evidence presented, reasonable minds can reach but a single conclusion – the MoE Policy insuring MacPherson, LLC has been liberalized to provide coverage for the arbitration award as a matter of law. Accordingly, it is proper to affirm the judgment entered by the trial court.

II. RESPONDENT'S STATEMENT OF FACTS

This case involves a dispute over insurance coverage for an arbitration award for a property damage loss. On November 15, 2004, arbitrator Henry Jameson awarded $399,088.32 to homeowners who had sued MacPherson, LLC for construction defects and resulting property damage to their home. MoE, the general liability carrier for MacPherson, LLC, denied coverage for the arbitration award and refused to contribute any money towards it. MoE sued MacPherson, LLC seeking a ruling that it owed no coverage for the arbitration award.

A. PROCEDURAL HISTORY

On January 28, 2005, the trial court denied MacPherson, LLC's motion for summary judgment on coverage, ruling that no coverage existed under the 1973 CGL form insuring the MacPherson entities as

a result of certain exclusions contained in the 1973 form.[5] MacPherson, LLC has appealed that ruling.

On August 9, 2005, in a subsequent summary judgment hearing, the trial court ruled that the MoE Policy had been "liberalized" to afford coverage as broad as that afforded by the 1986 CGL form as a matter of law.[6] The trial court then entered final judgment in favor of MacPherson, LLC, awarding the amount of the arbitration award, pre-judgment interest and attorney's fees and other costs of litigation.[7]

B. MOE'S TRANSITION TO THE 1986 CGL FORM

In the mid-1980's, nearly all insurance companies writing commercial liability insurance (except MoE) transitioned from the 1973 edition of the general liability coverage form to the revised 1986 Commercial General Liability form written by the Insurance Services Office, commonly known as ISO. The relevant difference between the 1973 CGL form and the 1986 CGL form is that the 1986 form is

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5 MacPherson, LLC wishes to clarify MoE's statement that "MacPherson conceded that under Washington law, the Hedges' house was the corporation's product, and there was no coverage for the corporation under the CGL." MacPherson's concession on this point was solely driven by the definition of "product" contained in the 1973 version of the primary CGL form utilized by MoE. Under the 1973 primary CGL form, the definition of "product" includes real property, thus making the Hedges' residence a "product." A different result would be compelled under more modern CGL forms, a point MoE concedes later in its brief. MacPherson concedes this point only with respect to the MoE 1973 primary CGL form at issue in this case.

6 CP 1267 – 1268.

7 CP 1587 – 1589.

broader in coverage, as it covers a general contractor's liability for property damage to, or arising out of, its subcontractors' work.[8] In this

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[8] In 1986, ISO drafted an updated version of the standardized general liability coverage form to clarify that coverage would be afforded for completed operations property damage losses if the damaged work or the work out of which the damage arose was performed by a subcontractor of the named insured. As one commentator stated:

> This exclusion was originally drafted in an endorsement to replace the work performed exclusion found in the body of the 1973 version of the CGL policy. . . . It excluded property damage to work performed "by or on behalf of the named insured." Thus, the phrase "by the named insured" found in the weakened exclusion, quoted above, deletes "or on behalf of" as found in the stronger 1973 exclusion which it replaced. **This seemingly subtle change was not an unintended, clerical oversight. It was a major, deliberate, and intentional broadening of coverage (by weakening the exclusion) by insurers in exchange for a significant additional premium. That is, where property damage is either (1) to work performed "on behalf of" the named insured or (2) arises out of work performed "on behalf of" the named insured, the property damage was intended to be covered.** However, the courts have been uneven in upholding the drafters' intended meaning. Some courts correctly applied the drafters' intent (and the policyholders' reasonable expectations of coverage). But, many other courts miss this intended and expected expansion in coverage. In doing so, the latter voided the completed operations coverage in their respective jurisdictions, which insureds had paid enormous additional premiums to secure. This inadvertently resulted in a windfall to insurers that may have reached hundreds of millions of dollars. Even the insurance industry organization that drafted the policy language, the Insurance Services Office, was embarrassed by the gross misconstruction of its language and, in response, issued its Circular No. GL 79-12 dated January 29, 1979, to confirm its original intent and admitting that this 1976 exclusion was "difficult to understand."
>
> . . .
>
> The 1970's version of the [your work] exclusion applies to property damage to work performed "by the named insured," thereby implicitly excepting from the exclusion any work performed "on behalf of the named insured." [Citation omitted]. The post-1986 exclusion takes a different drafting approach by

regard, MoE's corporate representative made two key admissions relevant to this appeal in her deposition. First, she confirmed that the 1986 form is broader in coverage, as it covers a general contractor's liability for property damage to, or arising out of, its subcontractors' work, whereas the 1973 form does not. Second, she admitted that the 1986 form would have provided coverage to MacPherson, LLC for the vast majority of the $400,000 arbitration award. As she testified:

> Q: If MacPherson had been insured under the '86 version, the so-called new form, a CG 0001 form such as the one attached to Exhibit 3, in your opinion would that have had a broader coverage potential than the '73 form?
>
> A: **Yes, it would have.**
>
> Q: And in fact, would you agree with me that Mutual of Enumclaw has paid millions of dollars towards construction defect claims involving property damage to subcontractor work occurring after substantial completion under the '86 form?
>
> A: That is correct. I would say '86 and later. We have numerous forms that we use, but, yes, under the CG 0001.
>
> . . .

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explicitly excepting work "performed on your behalf by a subcontractor." While clarifying the intent behind the exclusion, this new exception seemingly adds the requirement that the work be performed "by a subcontractor."

Scott C. Turner, *Insurance Coverage of Construction Disputes* Vol. 1 § 33.3 (2nd Ed. 2005) (emphasis added); and § 33:6 (West 2004).

A: I want to make sure I understand. You want to know if we were investigating this under the -- the MacPherson case under the CG 0001, if it would have affected our coverage position?

Q: Yes.

A: **Yes, it would have.**

Q. How so?

A: **We would have taken the position that work performed by the insured was their product, their work, and would not be covered. However, any resulting damage that occurred or any damage caused by work of the subcontractors would fall within the exception under the completed operations hazard and would have qualified for coverage.**

Q: And so the damage to the sheathing inside the EIFS at the Hedges' house would have been covered?

[Objection posed]

A: **Any -- again, any damage. So in this case we had a subcontractor who applied the EIFS and the damage that resulted from the water coming into the home would have been covered.**

Q: Under the 1986 version and its updated forms, like the '93, '97?

A: **Correct.** [9]

In late November, 2000, MoE elected to make the transition from the 1973 CGL forms to the 1986 CGL forms. MoE designated

[9] CP 1013 – 1018. (Emphases added).

this act as the transition from the "Pre-Simplified Program" (i.e. the 1973 forms) to the "Simplified Program" (i.e. the 1986 forms).

As part of this transition, MoE affirmatively represented to the OIC no less than 10 times that the transition would not result in an increase in premiums to its CGL policyholders. Specifically, on January 18, 2001, MoE reported to the OIC that the transition from the Pre-Simplified General Liability program to the Simplified General Liability program would result in a "Proposed Rate Level Change of -12.9%."[10] In a related filing, MoE represented that:

> Once this rate and rating rules submission is approved and implemented, MoE's estimated overall rate level change for Washington General Liability insurance is expected to be -11.5%.[11]

In a February 28, 2001, letter to the OIC, MoE summarized one of the main purposes of its transition program was "to guard against undue swings in premium due to changes in the exposure basis as well as the other rating criteria that were part of the ISO simplified CGL filing . . . ."[12]

An April 9, 2001, explanatory letter to the OIC specifically discussed the effect of premium revisions associated with the transition to the Simplified General Liability program:

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[10] CP 884.

[11] CP 982.

[12] CP 930 – 936. (Emphasis added).

Our actuary's rationale for presenting the rate indication was to demonstrate to the OIC that the Transition Program's *anticipated decrease in Mutual of Enumclaw's Washington GL direct premium written would be consistent with Mutual of Enumclaw's historical, albeit inapplicable, experience under the old ISO GL program.*

. . .

The fundamental point that we wanted to demonstrate was that our GL program, based upon ISO rates and the outdated GL exposure rating bases, would be transitioned to the simplified ISO program based upon loss costs, *with a decrease in Mutual of Enumclaw's Washington GL premium level. We wanted to demonstrate that the anticipated decrease in our Washington GL premium level would not be injurious to our financial stability.*

. . .

<u>If MoE transitioned to the simplified ISO GL program without the utilization of our selected factors, our insureds would have received premium increases.</u> The industry transition from the pre-simplified GL program to the simplified GL program did not result in a premium increase. *Therefore, as an ISO member, to be consistent with the principles of the ISO transition, MoE's transition should not result in an increase to policyholders.*

As it was our intent to transition to the simplified program without disrupting the marketplace, we selected the transition factors presented in our original filing. The factors that we proposed will permit MoE to move from our old ISO GL program based upon rates to the simplified ISO GL program based upon loss costs and simultaneously provide a modest decrease in our Washington GL premium level.[13]

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[13] CP 919 - 924. (Emphasis in italics added. Underline in original).

On May 22, 2001, MoE submitted a premium calculation worksheet to the OIC as part of the transition from the Pre-Simplified Program to the Simplified Program. In this document, MoE represented that the premium "[i]mpact on policyholders will be a modest decrease."[14] Two days later, on May 24, 2001, MoE reported to the OIC that "the estimated revenue change for [General Liability] is -7% . . . ."[15]

Again on May 24, 2001, MoE represented to the OIC that it had "re-rated our entire book of business . . ." and that "[t]hese modest decreases demonstrate that MoE will not receive a premium level change when we transition to the simplified ISO GL program.[16] In this same letter, MoE represented that "our insureds would receive a 7.95% premium decrease."[17] Most notably, in this letter, MoE concluded that:

> **No scenario results in a rate increase. All scenarios present an anticipated decrease.**[18]

The OIC approved MoE's use of the ISO Simplified General Liability program on August 1, 2001.[19]

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14 CP 885.

15 CP 883.

16 CP 881 – 882. (Emphasis added).

17 Id.

18 Id. (Emphasis added).

19 CP 1260; CP 880.

III. ARGUMENT

The documents and filings submitted to the OIC make clear that the broader 1986 forms were approved while MacPherson, LLC's policy was in force and with a modest decrease in premium to policyholders. Accordingly, the factual predicates for liberalization are met and, on the record presented, no reasonable mind could conclude that the policy should not be liberalized to afford coverage as broad as that provided by the 1986 CGL form. The trial court's ruling finding the MoE Policy had been liberalized is properly affirmed.

A. COVERAGE IS AFFORDED FOR THE ARBITRATION AWARD BY OPERATION OF THE LIBERALIZATION CLAUSE IN THE PRIMARY POLICY

In its General Conditions section, the MOE primary policy insuring MacPherson, LLC contains a Liberalization Clause, which reads as follows:

> In the event any filing is submitted to the insurance supervisory authorities on behalf of the Company and:
>
> (a) the filing is approved or accepted by the insurance authorities to be effective while this policy is in force or within 45 days prior to its inception; and
>
> (b) the filing includes insurance forms or other provisions that would extend or broaden this insurance by endorsement or substitution of forms, without additional premium,

> the benefit of such extended or broadened insurance shall inure to the benefit of the insured as though the endorsement or substitution form had been made.[20]

Liberalization clauses operate to benefit both policyholders and insurers. As one set of commentators noted:

> This [liberalization] provision obviously is equitable because it gives existing insureds the same broadened coverage now offered to new insureds. However, the liberalization clause is not entirely for the benefit of the insured. If policies did not automatically provide the broadened coverage, insurers would be swamped with requests that policies be endorsed, or that they be canceled and reissued, whenever coverage is improved. Automatically providing this coverage is the more practical approach, and it eliminates considerable administrative hassle.[21]

Courts have upheld liberalization clauses in cases where identical language was at issue. In Gerrish Corp. v. Aetna Cas. & Sur. Co.,[22] the insured's policy, which contained a pollution exclusion, was in effect from May 31, 1984 to May 31, 1985.[23] The insured was sued by the State of Vermont for pollution remediation and filed suit against Aetna seeking a declaration that the 1984 Aetna policy covered the State's claim.[24] On April 30, 1984, Aetna filed an ISO endorsement

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20 CP 1056. (Emphases added).

21 Eric A. Wiening & Donald S. Malecki, Insurance Contract Analysis (CPCU 1) 108 (American Institute For Chartered Property Casualty Underwriters 1st ed. June 1992).

22 949 F. Supp. 236, 230 (D. Vt. 1996).

23 Id. at 238.

24 Id.

with the insurance authorities that deleted the pollution exclusion.[25] The filing was approved, to be effective July 1, 1984, while the insured's 1984 Aetna policy was in force.[26] The endorsement was to be added to general liability policies without payment of an additional premium, "unless written application for a charge, with the consent of the insured is made to the Commissioner pursuant to the requirements of the Vermont Statutes."[27] No such application was made.[28] The court held that the requirements of the Liberalization Clause were therefore met, and the endorsement deleting the pollution exclusion became part of the 1984 policy.[29]

In this case, the undisputed facts establish that MacPherson, LLC is entitled to the coverage afforded by the broader 1986 version of the CG 00 01 coverage as a result of the Liberalization Clause in its policy.[30] All three requisites have been met:

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25 Id. at 240.

26 Id.

27 Id. at 240-41.

28 Id. at 241.

29 Id. *See also,* Gov't Employees Ins. Co. v. Wilson, 69 Misc. 2d 1020, 1023, 332 N.Y.S.2d 338 (Sup. Ct. 1972) (holding that the liberalization clause requirements of a homeowners liability policy were met where the increase in coverage limits occurred during the policy period, the change was filed with and approved by the New York State Department of Insurance, and the change was made without increased premium).

30 *See* CP 1165 – 1170.

1. MoE's Filing Of Forms Constituting The "Simplified Program" Was Approved By The OIC On August 1, 2001 – While MacPherson, LLC's Policy Was In Force

The first requirement for liberalization is:

> [T]he filing [must be] *approved or accepted by the insurance authorities to be effective while this policy is in force . . . .*

Rudy VanVeen, the MoE employee with principal responsibility for the transition to the Simplified Program, admitted that the new forms were accepted on August, 1 2001.[31] MoE Policy PK63751 was in force on August 1, 2001. Thus, the 1986 forms were "approved" while the MoE Policy covering MacPherson, LLC was in force. The first requirement of liberalization has been satisfied.

2. The Filing Broadens Coverage – As Testified To By MoE's Corporate Designee

Under the second requirement, the filing must include forms that would extend or broaden coverage. Here, MoE's corporate representative testified that the 1986 CGL form would have covered property damage to, and arising from, the work of MacPherson, LLC's subcontractors – precisely the type of damage occurring at the

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[31] CP 1260.

Hedges' residence.[32] Moreover, industry commentators unequivocally recognize the broadening effect in this regard.[33]

By MoE's own admissions, the forms approved in August of 2001 would have afforded coverage not available under the 1973 forms sold to MacPherson. The second element for liberalization has been met.

3. The New Filing Would Have Garnered No Additional Premium. In This Regard, The Evidence In The Record Is Overwhelming

The final requirement for liberalization is that the broadened coverage be available without additional premium. There is nothing mystical here. MoE said it best in May of 2001:

> **No scenario results in a rate increase. All scenarios present an anticipated decrease.**

"No" means "no" and "all" means "all." If MoE concluded that even a single scenario would result in a rate increase it would not have made the unequivocal statements made to the Insurance Commissioner. Moreover, there was no premium increase for contractors for the CG 00 01 form. For the designation "Contractors," MOE repeatedly reported in its submissions to the OIC that the

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[32] CP 1013 – 1018; *see also* n. 8, supra.

[33] *See* n. 8, supra.

premium differential was "1.0" (i.e. no premium difference).[34] Either MoE meant what it said in May of 2001 or it misrepresented its conclusions to the Insurance Commissioner. Any claim by MoE that MacPherson, LLC's premiums would have increased are based upon mere speculation, hearsay and legally incompetent testimony. This Court should lend no credence to MoE's self-serving spin on the facts. The third and final requirement for the liberalization of the MoE Policy has been met as a matter of law.

B. THE LIBERALIZATION CLAUSE WAS TRIGGERED AS A MATTER OF LAW

The evidence presented requires this Court to affirm the trial court's judgment in favor of MacPherson, LLC. Specifically, in November 2000, while the MacPherson, LLC policy was in force, MoE modernized its forms by substituting a version of the "new" CG 00 01 form for the outdated 1973 form. The Washington Insurance Commissioner approved the substitution of form on August 1, 2001 (while MacPherson, LLC's policy was in effect).[35] As part of its submission to the Insurance Commissioner, MOE was required to disclose whether there would be any increased premium for categories of insureds receiving the new form. MoE repeatedly represented that, after "re-rating its entire book of business," premiums would decrease.

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[34] *See* CP 957.

[35] CP 880.

The post facto evidence MoE presents cannot credibly serve to alter this conclusion. Thus, all factual predicates required by the Liberalization Clause are satisfied.

Based upon the record presented, the trial court was correct when it granted summary judgment in favor of coverage for the arbitration award as a result of the Liberalization Clause.

Again, all requisites for policy liberalization have been met:

> (1) The MoE filing was approved by the Insurance Commissioner of the State of Washington;
>
> (2) The MoE filing was approved effective during the MacPherson, LLC policy term of October 18, 2000 to October 18, 2001;
>
> (3) The MoE filing includes forms or other provisions that would extend or broaden the MacPherson, LLC insurance by endorsement or substitution of form consistent with the 1986 ISO CGL form which covers damage to and arising out of subcontractor work; and
>
> (4) The MoE filing clearly and repeatedly states that MoE re-rated its entire book of business applying the classifications, loss cost factors, transition plan, and all other changes incorporated into the Enumclaw filing to determine the premium impact, and that all of its insureds would receive a modest decrease in premium.[36]

It is therefore proper for this Court to affirm the trial court's ruling.

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[36] *See also* CP 1165 – 1170.

C. ANY CLAIM BY MOE THAT THE TRANSITION WOULD RESULT IN "WILD FLUCTUATIONS" IN PREMIUMS IS UNSUPPORTED

During the May 27, 2005 deposition of Rudy VanVeen, the MoE employee principally responsible for the filings to the OIC, it became apparent that MoE intended to avoid the liberalization of its policy by drumming up the fiction that the transition did not result in a decrease in premium but instead would have resulted in wild fluctuations in premiums. This Court must reject such an argument - as such a position absolutely contradicts every representation made to the OIC as part of the transition to the Simplified Program, including the representation that MoE "re-rated its entire book of business" and that "[a]ll scenarios present an anticipated decrease."

Alternatively, if such a position were to be true, then MoE would have obtained the OIC's consent to the transition based upon false, if not fraudulent, filings and representations.

IV. CONCLUSION

For the foregoing reasons, it is proper for this Court to affirm the summary judgment ruling and final judgment in favor of MacPherson, LLC. Should this Court affirm the trial court's rulings on liberalization, MacPherson, LLC's cross-appeal will be rendered moot.

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RESPECTFULLY SUBMITTED this 25th day of July, 2006.

THE HARPER FIRM, PLLC

By: _____

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BRIEF OF CROSS-APPELLANT

V. ASSIGNMENTS OF ERROR

Respondent/Cross-Appellant MacPherson Construction & Design, LLC ("MacPherson, LLC") assigns the following two errors to the trial court proceedings:

(1) The trial court erred when it denied MacPherson, LLC's Motion for Summary Judgment seeking insurance coverage under the umbrella supplement contained in a Comprehensive General Liability insurance policy issued by Appellant/Cross-Respondent Mutual of Enumclaw Insurance Company ("MoE") for an arbitration award entered against MacPherson, LLC. Specifically, the trial court erred when it failed to find that an endorsement contained in the umbrella supplement afforded coverage for property damage occurring after construction was complete and which arose out of subcontractor work.

(2) After MacPherson, LLC subsequently prevailed against MoE at the trial court level under a different theory of liability, the trial court erred when it failed to award MacPherson, LLC the full amount of attorney's fees and other costs of litigation incurred in litigating to obtain the benefit of the MoE insurance coverage.

Because this cross-appeal is taken from orders of summary judgment, the standard of review applicable to all assignments of error is de novo.

VI. STATEMENT OF THE CASE

A. INTRODUCTION & ORIGIN OF DISPUTE

This appeal involves a dispute over insurance coverage for an arbitration award against MacPherson, LLC, the successor company to a general contractor. Specifically, this appeal originates from two summary judgment rulings issued by the trial court.

In the first ruling, the trial court denied summary judgment motions filed by MacPherson, LLC and its predecessor company[37], which sought to establish insurance coverage as a matter of law, and granted MoE's cross-motion for summary judgment, which sought to deny insurance coverage as a matter of law. The trial court reserved for later determination the issue of whether MacPherson, LLC was entitled to insurance coverage for the arbitration award by operation of a "Liberalization Clause" contained in the MoE insurance policy.

Thereafter, in a second motion for summary judgment, MacPherson, LLC sought insurance coverage by operation of the "Liberalization Clause" contained in the MoE policy. The trial court granted MacPherson, LLC's second motion, finding coverage for the full amount of the arbitration award and pre-judgment interest on that amount. The trial court also awarded MacPherson, LLC a significantly reduced portion of its attorney's fees and other costs of litigation

[37] The predecessor company is not a party to this appeal.

incurred in litigating to obtain the benefit of the insurance purchased from MoE. The trial court subsequently entered final judgment in favor of MacPherson, LLC.

MoE then filed a Notice of Appeal, seeking review of the trial court's ruling on the issue of liberalization. MacPherson, LLC filed a Notice of Cross-Review, seeking review of the coverage issue decided in MoE's favor in the first summary judgment hearing, as well as of the amount of attorney's fees and costs awarded as part of the final judgment.

Should this Court affirm the trial court's ruling regarding insurance coverage afforded by liberalization of the MoE policy, the coverage arguments made in this brief become moot. Notwithstanding, in this brief MacPherson, LLC establishes that coverage for the arbitration award against it is afforded under the umbrella supplement contained in the MoE insurance policy.

B. THE CONSTRUCTION OF THE HEDGES HOME

MacPherson, LLC's predecessor, MacPherson Construction & Design, Inc. ("MacPherson, Inc."), was a general contractor incorporated in 1984. MacPherson, Inc. entered into a contract for the construction of a custom home for Thomas and Anne Marie Hedges.

The home was completed in 1998.[38] MacPherson, Inc. utilized subcontractors to perform the labor on the project, including the installation of the synthetic stucco siding (known by the acronym "EIFS"), all necessary flashing and waterproofing elements, the wood framing, the roof and the deck waterproofing.[39] Employees of the siding subcontractor inadvertently failed to install the necessary flashing and caulking at the seams of the synthetic stucco system.[40] Water entered the seams and caused severe damage to the wood framing and sheathing members underneath.[41]

In late 1999, on the advice of his accountant, Roger MacPherson created a new company named MacPherson Construction & Design, LLC, in order to operate his future construction business on a cash method, rather than on the accrual method utilized by MacPherson, Inc.[42] MacPherson, Inc. continued in existence as a holding company but transferred all of its assets and liabilities to MacPherson, LLC.[43]

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38 CP 228 at ¶ 2.

39 CP 229 at ¶ 3.

40 CP 234 – 238; CP 1361 – 1366.

41 CP 415 – 425 (Arbitrator's Detailed Award, dated December 7, 2004, at CP 416 – 417).

42 CP 229 at ¶ 4.

43 CP 228 – 230; CP 231 – 233.

C. THE HEDGES' LAWSUIT

On July 24, 2003, Thomas and Anne Marie Hedges filed a lawsuit in King County Superior Court[44] against MacPherson, Inc. to recover repair costs and consequential damages arising from the allegedly negligent construction of their home. On July 28, 2004, Hedges filed an Amended Complaint adding MacPherson, LLC as a defendant. The Amended Complaint alleged MacPherson, LLC was liable as a successor of MacPherson, Inc.

D. MOE SUES THE MACPHERSON ENTITIES

On August 12, 2004, MoE, the MacPherson companies' liability insurer, sued MacPherson, Inc. and MacPherson, LLC in King County Superior Court[45], seeking declarations that it was not obligated to cover any of the amounts sought by the Hedges.[46]

E. THE ARBITRATION AWARD

On November 15, 2004, arbitrator Henry Jameson awarded the Hedges $399,088.32 against both MacPherson, Inc. and MacPherson, LLC on a joint and several basis.[47] This arbitration award was comprised of: (1) $147,350.81 for repair of the property damage to the

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[44] King County Cause No. 03-2-31187-1 SEA.

[45] King County Cause No. 04-2-20363-5 SEA

[46] CP 1 – CP 5.

[47] CP 427.

wood sheathing and framing (installed by a subcontractor);[48] and (2) $251,737.38[49] for consequential damages resulting from the property damage.[50]

On November 29, 2004, MacPherson, LLC answered MoE's Complaint and filed a counter-claim seeking a declaration that MoE was obligated to provide insurance coverage for the full amount of the arbitration award.[51]

Thereafter, at MoE's request, and with the agreement of both MacPherson entities, the arbitrator itemized his award and provided the bases for it, by letter of December 7, 2004. In that letter, arbitrator Jameson stated:

> Clearly, the cost of repairing the property damage caused by the defective construction and of replacing the exterior EIFS which had to be removed to gain access to the damaged areas is a direct result of the failure to construct the house in accordance with the contract. In this case, the costs to inspect the house for damages and to repair the damage were as follows:

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48 CP 415 – 425 (Arbitrator's Detailed Award, dated December 7, 2004, at CP 419).

49 The award of consequential damages was comprised of the net difference in the sales price of the home, interior repair expenditures to facilitate the sale of the home, interest, tax and homeowner association dues. (CP 423.)

50 MoE concedes this loss was a consequence of the EIFS-related damage, and that the Hedges' inability to sell their home constituted "loss of use" of the home. (CP 393; CP 408). "Loss of use" is included in the definition of "property damage" in the MoE Policy.

51 CP 6 – 11.

		(12% from 10/1/03 to 11/15/04)
Andrey's	$99,286.59	
Tri-State	$7,894.29	
Dana's Weatherproofing	$4,750.60	
Building Permit Amount	$320.00	
Structural Engineer	$350.00	
Roofing materials	$16.00	
Fast Flashings	$1,788.67	
Subtotal	$114,406.00	$15,444.81
Landscaping	$7,500.00	
McGlynn	$10,000.00	
Subtotal	$17,500.00	
Subtotal of Interest	$15,444.81	
TOTAL	$147,350.81	

(Actual format of arbitration award for repair costs incorporated above).[52] This arbitration award was subsequently reduced to a judgment. MacPherson, LLC paid the arbitration award in full without the benefit of insurance coverage.

F. THE RELEVANT TERMS OF THE MOE POLICY

MoE insured both MacPherson, Inc. and MacPherson, LLC under a Comprehensive General Liability insurance policy, with a policy number of PK63751 (the "MoE Policy"). On January 1, 2000, MoE issued Change Endorsement No. 3, changing the Named Insured under both the primary and umbrella coverages to MacPherson, LLC to reflect the new corporate structure of the business.

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[52] CP 419.

The MoE Policy included primary coverage, written on a 1973 coverage form, as well as supplemental umbrella coverage.[53] It is the supplemental umbrella coverage which is at issue in this appeal.

G. THE UMBRELLA COVERAGE

The MoE Policy's supplemental umbrella coverage is comprised of several forms and endorsements, including the main policy form, designated as form UP-2 (5-74), and several endorsements, including one designated as UMB 3011.

1. The Umbrella Supplement's Insuring Agreement

MoE's corporate representative admitted in deposition that the MoE Policy's umbrella supplement contains "drop down" coverage, as opposed to "following form" coverage.[54] In "drop down" coverage, a loss excluded by a primary policy may nevertheless be covered by the umbrella policy if the umbrella policy contains broader coverage than the primary policy.[55] Because the umbrella supplement provides broader coverage than the primary coverage part, MacPherson, LLC seeks coverage for the arbitration award under this "drop down" coverage.

The insuring agreement of the umbrella supplement states:

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53 CP 429 – 542.

54 CP 395 at ln. 22-25.

55 CP 395 at ln. 10-21.

The company agrees to indemnify the insured for ultimate net loss in excess of the retained limit or underlying limit whichever is greater, which the insured may sustain by reason of liability

(a) imposed upon the insured by law; or

(b) assumed under any contract or agreement by the named insured, or by any officer, director, stockholder, partner or employee while acting within the scope of his duties as such, because of personal injury, property damage or advertising liability caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.[56]

2. <u>The Exclusions In The Umbrella Supplement's Basic Coverage Form</u>

The umbrella supplement's basic UP-2 coverage form contains exclusions relating to property damage, including exclusions for:

(1) property damage to the named insured's products;[57]

(2) property damage to work performed by or on behalf of the named insured;[58] and

(3) such part of any damages or expense which represents the cost of inspecting, repairing, replacing, removing, recovering, withdrawing from use or loss of use of, because of any known or suspected defect or deficiency therein, any
(a) goods or products or any part thereof (including any container) manufactured, sold,

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[56] MoE's designated representative admits that the damage to the Hedges' residence was accidental, thus meeting the definition of an "occurrence" under the MoE Policy. (CP 390 at ln. 1-4; CP 397 at ln. 21-22.)

[57] Referred to as the "products exclusion" in this brief.

[58] Referred to as the "work performed" exclusion in this brief.

handled or distributed by the named insured, or by others trading under his name; or

(b) work completed by or for the named insured; or

(c) other property of which such goods, products or work completed are a component part or ingredient.[59]

The umbrella supplement also contains the following Severability of Interest provision:

> The insurance afforded applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.[60]

3. The UMB 3011 Endorsement Broadens The Umbrella's Coverage

Critical to this appeal, attached to, and made part of, the MoE Policy was an endorsement designated as form UMB 3011, entitled Broad Form Property Damage Including Completed Operations.[61] The UMB 3011 endorsement stated in relevant part:

> ***The exclusions of this policy relating to Property Damage are replaced by the following exclusion...***
>
> A. To Property Damage

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[59] Though correctly known as the "sistership exclusion," in the trial court MoE sometimes referred to this exclusion as the "cost of repair" exclusion. As such, this exclusion may be referred to by either label in this brief.

[60] CP 515 – 542.

[61] CP 531.

1. To property owned or occupied by or rented to the Insured or, except with respect to the use of elevators, to property held by the insured for sale or entrusted to the Insured for storage or safekeeping.

2. Except with respect to liability under a written sidetrack agreement or the use of the elevators to:

   (a) Property while on premises owned by or rented to the Insured for the purpose of having operations performed on such property by or on behalf of the Insured,

   (b) tools, or equipment while being used by the Insured in performing his operations,

   (c) property in the custody of the Insured which is to be installed, erected or used in construction by the Insured,

   (d) that particular part of any property, not on premises owned by or rented to the Insured,

      (1) upon which operations are being performed by or on behalf of the Insured at the time of the Property Damage arising out of such operations, or

      (2) out of which any Property Damage arises, or

      (3) the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the Insured;[62]

[62] CP 531 (emphasis added).

At her deposition, MoE's adjuster handling the claim, Erin Weatherspoon, explained the broadening effect of the UMB 3011 endorsement on coverage:

> Q: And you were looking at the umbrella policy so as to try to find ways to maximize coverage for the policyholder?
>
> A: Yes.
>
> Q: Tell me what you found in the umbrella that would help find coverage for the policyholder.
>
> A: Well, the property damage endorsement [UMB 3011]. There is a change. I can't quote it for you. But I felt that it might broaden things a little bit. Then I looked at the definition of -- those definitions of property damage in relation to the possibility of coverage for other things that the Hedges were claiming.
>
> Q: Do you know whether or not the umbrella policy would provide coverage for liability that the policyholder assumed under a contract?
>
> A: It should.[63]

H. MOE INTERNALLY CONCLUDES THERE IS COVERAGE UNDER THE UMBRELLA SUPPLEMENT

On September 21, 2004, MoE's claim adjuster made the following notation in the MoE claim file:

> Also received declaration pages and exclusion endorsements on subsequent policies [issued by insurers other than MoE]. . . . Based on what was provided, I do not believe that there is any coverage

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[63] CP 546 at ln. 8–24.

> available for this loss for the MacPhersons *thus triggering coverage under the Umbrella.*[64]

On October 6, 2004, counsel for MoE furnished a coverage update to MacPherson, LLC, again recognizing that it had found coverage for the Hedges' claim under the umbrella supplement: "[i]t is my understanding that sufficient insurance money was made available to fully cover the cost of repair of any damage to tangible property."[65] Likewise, notes made in an October 20, 2004 claim activity log state: "[spoke with] Debbi [Sellers] . . . Discussed prejudgment interest on repair costs – *compensable/payable under umbrella* . . ."[66]

MoE again conceded coverage under the umbrella supplement on November 5, 2004, as adjuster Erin Weatherspoon admitted at her deposition:

> Q: [I]t says, "Portions of this amount is economic loss and is not covered, even if we have some coverage under the umbrella (repair costs 146K and prejudgment interest)." At the time you wrote this e-mail, MacPherson LLC was the insured under the MOE policy, correct?
>
> A: Yes.
>
> Q: You said, "even if we have some coverage under the umbrella." What coverage did you think might be available under the umbrella when you wrote this e-mail?

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64 CP 413 (emphasis added).

65 CP 555 – 556.

66 CP 558 (emphasis added).

A: For repair costs.

Q: And prejudgment interest, correct?

A: Uh-huh.[67]

I. MOE DENIES COVERAGE FOR THE ARBITRATION AWARD

Inexplicably and despite the previous acknowledgements of coverage under the umbrella supplement, by letter dated December 2, 2004, MoE formally denied coverage for the entire arbitration award.[68]

J. THE SUMMARY JUDGMENT HEARINGS

1. The First Summary Judgment Ruling

On February 15, 2005, the trial court granted MoE's motion for summary judgment and denied MacPherson, LLC's motion for summary judgment.[69] In so ruling, the trial court found that "[t]here is no coverage for [MacPherson, LLC's] liability to the Hedges under MoE policy No. PK 63751 as a result of policy exclusions."[70] The trial court, however, found that "there remains an unresolved question of fact as to whether MacPherson, LLC is entitled to coverage as a result of the Liberalization Clause contained in MacPherson, LLC's

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67 CP 545 at ln. 3-17.

68 CP 560; *see also* CP 396 at ln. 2-5.

69 CP 851 – 854.

70 CP 854.

Comprehensive General Liability policy."[71] MacPherson, LLC has appealed this ruling.

2. The Second Summary Judgment Ruling

On August 9, 2005, the trial court granted MacPherson, LLC's motion for summary judgment on the issue of liberalization, finding coverage for the arbitration award by operation of the "Liberalization" clause contained in the MoE Policy.[72] MoE has appealed this ruling.

K. THE FINAL JUDGMENT AGAINST MOE

On January 9, 2006, the trial court entered Final Judgment against MoE and in favor of MacPherson, LLC in the amount of $395,199.37.[73] This amount was a downward departure from the original amount sought by MacPherson, LLC - $534,667.52.[74] The trial court's actual calculation of the final judgment amount follows:

Arbitration award		$400,988.32
Prejudgment interest on arbitration award		$44,108.72
Attorneys' fees and costs	~~$165,900.75~~	$43,447.88
Prejudgment interest on attorney's fees and costs	~~$12,292.68~~	
Other litigation fees and costs		$6,654.45
Prejudgment interest on other litigation fees and costs	~~$510.60~~	
Consequential time loss damages	~~$4,212.00~~	
Less other recovery set-off		($100,000.00)
TOTAL	**~~$534,667.52~~**	**$395,199.37**[75]

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71 CP 854.

72 CP 1267 – 1268.

73 CP 1587 – 1588.

74 CP 1588.

75 CP 1588.

In its Findings of Fact and Conclusions of Law, the trial court explained its $122,452.87 reduction of the fees and costs awarded as follows:

> The court finds that a significant part of the attorneys fees were duplicative and/or unrelated to the coverage issues.[76]

VII. SUMMARY OF ARGUMENT

The principal issue presented in this cross-appeal is whether the umbrella supplement contained in the MoE Policy affords insurance coverage to MacPherson, LLC for the arbitration award and, consequently, whether the trial court's summary judgment order denying coverage for that award should be reversed.

Additionally, MacPherson, LLC respectfully requests that this Court award MacPherson, LLC the total amount of fees and costs sought. Alternatively, this Court should reverse and remand the trial court's award of attorney's fees and costs for re-calculation under a formula which awards the full amount of fees and costs incurred in litigating against MoE to obtain the full benefit of the insurance coverage purchased.

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[76] CP 1878 – 1882.

VIII. ARGUMENT

A. COVERAGE FOR THE ARBITRATION AWARD IS PROPERLY FOUND UNDER THE UMBRELLA SUPPLEMENT CONTAINED IN THE MOE POLICY

The endorsement in the MoE umbrella supplement designated as "UMB 3011" **replaced** the umbrella policy's exclusions "relating to" property damage. The net result of this replacement is that the completed operations coverage provided by the UMB 3011 endorsement covers property damage occurring after construction is complete and which arises out of subcontractor work. Here, the arbitration award against MacPherson, LLC undisputedly involved property damage occurring after construction was complete and which arose out of the work of subcontractors.

1. The Trial Court Failed To Give Meaning To The UMB 3011's Deletion Of The Phrase "On Your Behalf" In The "Work Performed" Exclusion

The "work performed" exclusion contained in the umbrella supplement's basic UP-2 coverage form excludes coverage for property damage "to work performed by or on behalf of the named insured." The UMB 3011 endorsement replaces all property damage exclusions contained in the UP-2 form, however. The UMB 3011 deletes the phrase "on behalf of" from the "work performed" exclusion. The revised "work performed" exclusion states:

B. With respect to the **COMPLETED OPERATIONS HAZARD** to Property Damage to work performed by the Named Insured arising out of the work of any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

By utilizing a policy form deleting the phrase "on behalf of" in the work performed exclusion, no conclusion can be reached other than MoE intended to cover property damage to, or arising from, the work of the policyholder's subcontractors. As one leading commentator aptly explains, the deletion of the phrase "on behalf of" serves as a deliberate broadening of coverage:

> This exclusion was originally drafted in an endorsement to replace the work performed exclusion found in the body of the 1973 version of the CGL policy. . . . It excluded property damage to work performed "by or on behalf of the named insured." Thus, the phrase "by the named insured" found in the weakened exclusion, quoted above, deletes "or on behalf of" as found in the stronger 1973 exclusion which it replaced. **This seemingly subtle change was not an unintended, clerical oversight. It was a major, deliberate, and intentional broadening of coverage (by weakening the exclusion) by insurers in exchange for a significant additional premium. That is, where property damage is either (1) to work performed "on behalf of" the named insured or (2) arises out of work performed "on behalf of" the named insured, the property damage was intended to be covered.** However, the courts have been uneven in upholding the drafters' intended meaning. Some courts correctly applied the drafters' intent (and the policyholders' reasonable expectations of coverage). But, many other courts miss this intended and expected expansion in coverage. In doing so, the latter voided the completed operations coverage in their respective jurisdictions, which insureds had paid enormous additional premiums

> to secure. This inadvertently resulted in a windfall to insurers that may have reached hundreds of millions of dollars. Even the insurance industry organization that drafted the policy language, the Insurance Services Office, was embarrassed by the gross misconstruction of its language and, in response, issued its Circular No. GL 79-12 dated January 29, 1979, to confirm its original intent and admitting that this 1976 exclusion was "difficult to understand."[77]

2. Insurance Industry Intent Is Similarly Unequivocal And Supports A Finding Of Coverage

The umbrella supplement in the MOE Policy is comprised of forms drafted by the Insurance Services Office ("ISO"), an organization charged with standardizing insurance industry coverage forms.[78] ISO publishes explanatory memoranda, commonly known as "circulars," intended to explain certain coverages and coverage forms.[79] In 1979, ISO published a circular explaining the effect of Broad Form Property Damage endorsement's deletion of the "by or on behalf of" language that was contained in the "work performed" exclusion of the basic liability coverage.[80] Here, MOE admits that: (1) MOE follows ISO's intent;[81] and (2) MOE has no evidence that its underwriters intended anything contrary to ISO's intent that the deletion of the "by or on

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77 Scott C. Turner, *Insurance Coverage of Construction Disputes* Vol. 1 § 33.3 (2nd Ed. 2005) (emphasis added).

78 CP 240 at ¶8.

79 CP 240 at ¶8.

80 CP 249 – 257.

81 CP 241at ¶9; CP 406 at ln. 6-11.

behalf of" language is to provide coverage for damage to the named insured's work arising out of subcontractor's work and for damage to subcontractor work arising out of other subcontractor's work.[82] The relevant portion of this circular explaining the coverage afforded by MOE's UMB 3011 endorsement is reproduced below:

(The following applies to exclusion (z) in Advisory Endorsement ADV.-3006-Broad Form Property Damage Endorsement)
(Including Completed Operations)

(z) with respect to the completed operations hazard and with respect to any classification stated below as "including completed operations", to property damage to work performed by the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

(z) - This exclusion in endorsement ADV.-3006, which modifies the corresponding policy exclusion, provides broad form completed operations property damage coverage by excluding only damages caused by the named insured to his own work. Thus,

(1) The insured would have no coverage for damage to his work arising out of his work.

(2) The insured would have coverage for damage to his work arising out of a subcontractor's work.

(3) The insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.

(4) The insured would have coverage for damage to a subcontractor's work, or if the insured is a subcontractor to a general contractor's work or another subcontractor's work, arising out of the insured's work.

The majority of courts around the country agree with ISO's intent concerning coverage for subcontractor work under the Broad Form Property Damage Endorsement.[83] As discussed below, this Court

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82 CP 407 at ln. 7-16.

83 The case at bar is distinguishable from Schwindt v. Underwriters at Lloyd's of London, 81 Wash. App. 293, 914 P.2d 119 (1996). That case involved a Lloyd's form with a similar name, but not the ISO form used by MOE. Noting that there was no evidence London intended what ISO intended, the Schwindt court held that the deletion of the language "on behalf of" did not provide coverage for work done by subcontractors. Unlike this case, the Schwindt decision based its holding on the fact that the litigants presented no evidence that the "insurers did not intend to include the work of subcontractors in [the Schwindt policies' exclusionary] provisions." Here, MacPherson, LLC presents such evidence through the ISO circular and

must reverse the trial court on the issue of coverage under the umbrella supplement.

The Ninth Circuit Court of Appeals considered the precise issue presented in Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co.[84] In that case, a sawmill contracted with Fireguard to upgrade a fire suppression system, which included the construction and installation of a water reservoir tank. Fireguard in turn contracted with subcontractors to perform the requested work. . The sawmill sued Fireguard after one of Fireguard's subcontractors allegedly caused a landslide which destroyed the tank and other parts of the project.[85]

Scottsdale provided general liability insurance to Fireguard. Scottsdale claimed its liability policy did not cover losses resulting from the work of subcontractors.[86] Fireguard commenced an action seeking to establish insurance coverage for the damage resulting from the work of Fireguard's subcontractors. The trial court granted Scottsdale's motion for summary judgment and found that no insurance coverage for the damage at issue existed.

In reversing the trial court, the Fireguard court set forth a

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through MOE's admission that it uncovered no evidence that its underwriters intended otherwise.

84 864 F.2d 648 (9th Cir. 1988).

85 Id. at 649.

86 Id.

detailed discussion of the effect of the deletion of the phrase "on behalf of" from the completed operations hazard exclusion. The holding in Fireguard is on all fours with the case at bar:

> We conclude that Fireguard's interpretation of the policy is the correct one. **The language of the completed operations hazard exclusion in the endorsement, as opposed to that in the basic policy, does not exclude from coverage the work performed by subcontractors. We cannot conclude that omission of the phrase "or on behalf of" in section VI(A)(3) of the endorsement has no significance. Because this phrase was deliberately deleted in one paragraph and retained in the immediately preceding paragraphs, we are persuaded that the exclusion in the endorsement applies only to work performed by the named insured. If Scottsdale wanted to exclude work performed by subcontractors in the endorsement of this carefully drafted policy, it need only have inserted "or on behalf of" in section VI(A)(3) to make its intent crystal clear. Words deleted from a contract may be the strongest evidence of the intention of the parties."**[87]

In McKellar Development of Nevada, Inc. v. Northern Ins. Co. of New York,[88] an apartment owner sued McKellar for construction defects and resulting property damage. The owner alleged that the soil compaction performed by one of McKellar's subcontractors was faulty, causing the resulting damage to the apartment. Northern Insurance Company issued Comprehensive General Liability policies to McKellar identical to the policy issued to MacPherson.

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[87] Id. at 651 (emphasis added).

[88] 108 Nev. 729, 837 P.2d 858 (1992).

The Northern policy insuring McKellar contained a Broad Form Property Damage ("BFPD") endorsement which modified the exclusions in the basic policy.[89] While the basic policy excluded property damage "to work performed *by or on behalf of* the named insured . . .," the BFPD modified the exclusion as follows:

> Exclusions (k) and (o) are replaced by the following:
>
> (3) with respect to the completed operations hazard . . . to property damage performed *by* the named insured . . . .[90]

The relevant deletion was the "or on behalf of" language stated in the basic policy's exclusion. In finding coverage existed, the McKellar court held that the deletion of "or on behalf of" operated to provide coverage for the work of the named insured's subcontractors:

> Thus, the BFPD completed operations hazard exclusion eliminates the phrase "or on behalf of" and applies only to work performed "by the named insured." We agree with appellants that the elimination of the phrase "or on behalf of" indicates that the work of subcontractors was intended to be covered by the policies. Because appellants relied on subcontractors to do the soil compaction, the BFPD endorsement provides coverage.[91]

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89 Id. at 731.

90 Id. at 731-32 (emphasis added).

91 McKellar,108 Nev. at 732; *see also* Maryland Casualty Co. v. Reeder, 221 Cal. App. 3d 961, 270 Cal. Rptr. 719 (1990) (explaining insurance industry's intent behind change).

An appellate case from California similarly holds. As stated in Maryland Casualty Co. v. Reeder:

> The insureds' interpretation of the endorsement is supported by the insurance industry's own construction of the broad form endorsement. As we have seen, the terms of the endorsement were drafted by ISO, which also publishes circulars designed to explain the intent, purpose and effect of its standard form provisions. In one such circular the ISO explains the broad form endorsement is intended to "exclud[e] only damages caused by the named insured to his own work. Thus, . . . [t]he insured would have coverage for damage to his work arising out of a subcontractor's work [and] [t]he insured would have coverage for damage to a subcontractor's work arising out of the subcontractor's work.[92]

Here, the completed operations coverage contained in the UMB 3011 endorsement is identical to that discussed in the above-cited cases. Specifically, the MOE Policy's basic exclusion for property damage to work performed "by or on behalf of" the Named Insured has been replaced with an exclusion in the UMB 3011 for property damage to work performed "by the Named Insured." The damaged work (and the work out of which the damage arose) was undisputedly performed by subcontractors. Under the authority cited above, coverage is afforded for the amount to repair this damage, plus pre and post-judgment interest. MacPherson, LLC is entitled to a

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[92] Reeder, 221 Cal. App. 3d at 971-72.; Fejes v. Alaska Ins. Co. Inc, 984 P.2d 519, 525 (Alaska 1999) (holding "since the property damage in this case arose from subcontractor's work, the exclusion does not apply."); Corner Construction Company v. USF&G, 638 N.W.2d 887, 891-93 (S. Dak. 2002).

ruling that coverage is afforded by the umbrella supplement for the arbitration award entered against it and the trial court's contrary ruling must be reversed.

3. The Cases MOE Will Rely On Are Inapposite

MOE will likely rely on decisions from the Minnesota Supreme Court to endorse the so-called "Minnesota rule." However, two recent decisions (one from the Minnesota Supreme Court and one from the U.S. District Court for the District of Minnesota applying Minnesota law) are directly contrary to MoE's position in this regard.

In the first case, Wanzek Construction, Inc. v. Wausau,[93] Wanzek was the general contractor for the construction of a municipal swimming pool. Wanzek subcontracted the manufacture of coping stones to Aquatic Designs. Once the pool was open for use, several patrons were injured as a result of cracked coping stones. Wanzek replaced the stones and submitted a claim for indemnity to its liability insurer, Wausau.

In finding coverage for the cost to repair the subcontractor's work, the Wanzek court criticized its prior decisions in Bor-Son[94] and

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93 679 N.W.2d 322, 2004 Minn. LEXIS 235 (2004).

94 Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58, 61-63 (Minn. 1982).

Knutson[95] (the cases MoE relied on in the trial court). Critical to its distinguishing those prior cases, the Wanzek court held that the Bor-Son and Knutson rationale (i.e. a general contractor's entire completed construction project is the contractor's "product") does not apply where the policy defines "product" to exclude "real property" from its definition. The insurance policy in Bor-Son and Knutson utilized a prior definition of "real property" which *did not* exclude real property. Wanzek's insurance policy, on the other hand, utilized the modern definition of "product" which excludes "real property." However, because the "products" exclusion contained in the UP-2 form is deleted in its entirety by the UMB 3011 form, the rationale of Bor-Son and Knutson is entirely misplaced in the context of this case.

In the second case, Westfield Insurance Company v. Weis Builders, Inc.,[96] a general contractor sought indemnity coverage from several of its insurers for water intrusion and other property damage to a townhome development. In holding that the insurers owed the general contractor indemnity coverage, the Westfield court reiterated that the Wanzek court had "dispensed with" the Bor-Son and Knutson decisions, a holding which merits the following extensive quotation:

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[95] Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 231-33 (Minn. 1986).

[96] 2004 U.S. Dist. LEXIS 13658 (2004) (applying Minnesota law).

Westfield acknowledges that under exclusion (1), it must provide coverage for property damage to Weis's work, provided that the damaged work was performed by subcontractors on Weis's behalf. However, it asserts that the "business risk doctrine" applies to preclude coverage for the repair and replacement costs of defective work itself. *See* Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am., 323 N.W.2d 58, 61-63 (Minn. 1982) (endorsing the business risk doctrine); Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 231-33 (Minn. 1986) (reaffirming Bor-Son). The business risk doctrine is a judicially-recognized doctrine related to manageable risks. Manageable risks include (1) risks which management can and should control or reduce to manageable proportions; (2) risks which management cannot effectively avoid because of the nature of the business operations; and (3) risks that relate to the repair or replacement of faulty work or products. The doctrine provides that the types of risks that are a normal, foreseeable, and expected incident of doing business should be reflected in the price of the product or service rather than as a cost of insurance to be shared by others. In response, Weis asserts that Bor-Son and Knutson are inapposite because they are based on the "your work" exclusion in the 1973 CGL standard-form policy whereas the Westfield policy is based on the 1986 CGL standard-form policy.

As if on cue, three days after the Court heard oral argument on these motions, the Minnesota Supreme Court issued an opinion dispensing with the Bor-Son and Knutson interpretation of the "your work" exclusion. *See* Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322 (Minn. 2004). In that case, the Minnesota Supreme Court held that the extent to which a policy covers business risks must be governed by the specific terms of the contract, as opposed to the business risk doctrine. Id. at 327. Therefore, the Court finds that exclusion (1) does not apply to exclude coverage for those claimed damages that involve damaged work or work out of

which the damage arises if that work was performed by a subcontractor on Weis's behalf.[97]

In sum, the case at bar is not about whether Washington has tacitly adopted either the "Oregon Rule" or the "Minnesota Rule." This case is about interpreting an insurance policy consistent with its terms and the stated intent of those terms. The authority MOE will likely rely upon either: (1) deals with different policy language issued by insurance companies which did not subscribe to ISO's interpretations; or (2) has been dispensed with by subsequent decisions. Accordingly, this Court should rule that the umbrella supplement covering MacPherson, LLC provides coverage for the arbitration award.

B. THE SCHWINDT DECISION IS NOT CONTROLLING IN THE FACE OF ISO INTENT

MOE may incorrectly attempt to rely on the case of Schwindt v. Underwriters at Lloyd's of London[98] in an attempt to exclude all coverage for the arbitration award. The Schwindt decision is distinguishable, as that case dealt with non-ISO forms and lacked any evidence of ISO intent. Here, the ISO forms and evidence of ISO intent before the Court in this case compels a conclusion in favor of coverage.

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97 Id. at *15-*17. (Emphasis added).

98 81 Wn. App. 293, 914 P.2d 119 (1996).

In fact, there is no case in any jurisdiction denying coverage for damage arising out of subcontractor work where ISO intent was considered by the deciding court, and where the insurer changed one of its own policy forms from "by or on behalf of" to "by...." As the Schwindt court stated:

> Schwindt and Jones argue that the exclusions do not apply to products installed and work done by subcontractors because the policy exclusions refer to products installed and work done by "the Assured," not "on behalf of" the assured. They rely on cases where the policy had previously omitted the language, "on behalf of," evidencing an intent not to include subcontractors in the products exclusions provisions. But these cases do not address the policy language at issue in this case. **Here, there is no comparable evidence that the insurers did not intend to include the work of subcontractors in these provisions.**[99]

As noted, it is undisputed that MOE follows ISO intent and there is comparable evidence of ISO intent in the record in this case which was not before the court in Schwindt.

Moreover, the Schwindt decision expressly relies upon the rationale of the Minnesota Supreme Court's decisions in the Bor-Son and Knutson cases (which were subsequently "dispensed with" by the Minnesota Supreme Court in the 2004 Wanzek decision) and is therefore easily distinguishable from the case at bar.[100]

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[99] Schwindt, 81 Wn. App. at 305 (emphasis added).

[100] Id. at 306.

As the Washington Supreme Court stated in J.W. Seavey Hop Corp. v. Pollock,[101] "[i]t is the duty of the court to declare the meaning of what is written and not what is intended to be written." Here, MacPherson, LLC presents substantial evidence of ISO intent explaining the coverage afforded by the UMB 3011 endorsement. MOE intended what ISO intended, as evidenced by a more thorough recitation of MOE's CR 30(b)(6) testimony in a similar case involving the identical UMB 3011 endorsement:

> Q. You don't have any knowledge as you sit here today whether the MOE underwriters involved in underwriting the MacPherson policies intended anything different from sections 2, 3 and 4 on page 10 of the ISO circular, correct?
>
> A. As it relates to the UMB3011?
>
> Q. Yes.
>
> A. **That's correct, with regards to how that -- that that endorsement would be interpreted in the same fashion.**
>
> Q. You never came across any literature anywhere, either in the underwriting file or in general underwriting materials at Mutual of Enumclaw, stating that the company intended something different with its UMB3011 completed operations language, than is set forth in paragraphs (2), (3) and (4) of the ISO circular, correct?
>
> A. **Yeah.** I did not –

[101] 20 Wn.2d 337, 349, 147 P.2d 310 (1944).

Q. And so as the designated representative of Mutual of Enumclaw, if there is any written underwriting material, either in MOE's MacPherson underwriting file, or any other place in the company that expresses a contrary intent from the ISO intent set forth in paragraphs (2), (3) and (4), you are unaware of it, correct?

A. **That's correct.**[102]

The explanations provided in the ISO circular, as well as the admissions contained in the deposition testimony of Ms. Sellers (MOE's CR 30(b)(6) deponent) serve as competent and compelling evidence that MacPherson, LLC's interpretation of the scope of the completed operations coverage afforded by the UMB 3011 endorsement is the correct interpretation. If MoE had intended to exclude coverage for damage to, or arising from, subcontractor work it had the option of excluding it by, among other ways: (a) not excising the phrase "or on behalf of" from the "work performed" exclusion; or (b) clearly stating that property damage to work performed "by the named insured *or any of its subcontractors*" is excluded.[103] To the contrary,

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[102] CP 407.

[103] *See* Lynott v. National Union Fire Ins. Co., 123 Wn.2d 678, 688, 871 P.2d 146 (1994) (in interpreting the reach of an exclusion in an insurance policy, the court noted that "[i]t is highly significant that National Union had available a form endorsement specifically excluding claims arising out of a merger or acquisition involving a particular entity. National Union did not use that available, standard form endorsement which would have identified with particularity the transaction which it now claims it intended to exclude. **'In evaluating the insurer's claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'**)

MoE failed to use any language which would alter ISO's clear intent to cover damage to, or arising out of, subcontractor work. The trial court's ruling denying coverage must be reversed.

Finally, it would be absurd for MOE to argue that ISO intent in favor of coverage was not "mutual." Given MOE's own testimony in this case that it followed ISO intent, and given the stated intent in the ISO circular, MOE cannot credibly suggest or imply that, while it and ISO *intended coverage*, MacPherson, LLC *intended no coverage*.[104] To this end, "[e]xclusions of coverage will not be extended beyond their 'clear and unequivocal' meaning", especially where an insurance company has the option of using standard form language which would have excluded specifically the subject transaction beyond doubt.[105] As stated, MOE had form language available to it that would have put the issue beyond dispute (such as by *not* deleting the "by or on behalf of" language). Instead, it chose to delete that language and cannot now claim that the deletion of the words "or on behalf of" was *mutually intended* to have no effect.

(emphasis added) (citing 13 John A. Appleman & Jean Appleman, *Insurance Law & Practice* § 7402 (1976)).

[104] Toulouse v. New York Life Ins. Co., 40 Wn.2d 538, 541, 245 P.2d 205 (1952) (holding that "[i]f there be any ambiguity in a contract, the interpretation which the parties have placed upon it is entitled to great, if not controlling, weight in determining its meaning.").

[105] Lynott, 123 Wn.2d 678, 693-94, 871 P.2d 146 (1994).

In a strained effort to affirm the trial court's ruling, MOE may rely upon rationale such as that found in the Tennessee Court of Appeals opinion in Blaylock and Brown Construction, Inc. v. AIU Ins. Co.[106] to support its position that the deletion of the "one behalf of" language is without effect and bars insurance coverage for damage arising out of subcontractor work. The Blaylock case, however, is a 1990 case relying, once again, on the holdings of the Minnesota Bor-Son and Knutson cases.[107] As exhaustively briefed and argued on summary judgment, the Minnesota Supreme Court "dispensed with" the archaic rationale of Bor-Son and Knutson in the Wanzek[108] decision discussed earlier in this brief.

C. THE ARCHER DECISION DOES NOT CONTROL THE CASE AT BAR

MOE may also claim that the decision in Mutual of Enumclaw v. Patrick Archer Construction, Inc.[109] controls. It does not. In Archer, the issue before this Court was whether the "products" exclusion contained in a 1973 Comprehensive General Liability insurance policy barred coverage for a property damage loss.[110] As stated by the

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106 796 S.W.2d 146, 1990 Tenn. App. LEXIS 338 (1990).

107 *See* Blaylock and Brown, 796 S.W.2d at 153-54.

108 679 N.W.2d 322, 2004 Minn. LEXIS 235 (2004); *see also* Westfield Insurance Company v. Weis Builders, Inc., 2004 U.S. Dist. LEXIS 13658 (2004) (applying Minnesota law).

109 123 Wn. App. 728, 97 P.3d 751 (2004).

110 Id. at 731.

court: "[r]ather, the applicability and scope of the products exclusion is at issue."[111]

The insurance policy at issue in Archer did not contain the UMB 3011 endorsement. Likewise, the UMB 3011 endorsement at issue in this case does not contain a "products exclusion." To the extent Archer mentions Schwindt, this Court again is reminded that Schwindt was not a case that dealt with either an ISO policy or ISO intent. Simply put, none of the exclusions at issue in this case were at issue in Archer and that case is irrelevant to the case at bar.

D. THE "THAT PARTICULAR PART" EXCLUSION IS INAPPLICABLE

MOE may also claim that the "that particular part" exclusion contained in the UMB 3011 endorsement excludes coverage for the entirety of the arbitration award. It is anticipated that MOE will incorrectly cite Vandivort v. Seattle Tennis Club[112] for this proposition. Vandivort is factually and legally distinguishable from this case for the following five reasons.

First, in Vandivort, a landslide damaged a worksite during the course of construction. Vandivort therefore involved an operations loss (i.e. damage that occurred during the course of a construction

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[111] Id. at 733.

[112] 11 Wn. App. 303, 522 P.2d 198 (1974).

project). The loss at issue in this case is a completed operations loss (i.e. the damage occurred after the Jenkins' home was put to its intended use). Thus, the facts of Vandivort are entirely different than those presented in this case.

Second, the issue in Vandivort was the extent of a contractor's operations. The Vandivort court held that a contractor's operations extended to the entirety of the job underway. Vandivort does not hold (or even imply) that "that particular part" of a construction project is the entirety of the completed job in the context of a completed operations loss. Here is what the Vandivort court really said:

> Endorsement No. 7(2)(iv)(a) which excludes coverage for damage to "that particular part of any property, . . . **upon which operations are being performed** by . . . insured . . ." bars Vandivort's recovery. Vandivort argues that because the slide occurred at Seattle Tennis Club's North property line and damage is claimed beyond that point, the exclusion which it argues applies only to that particular part of any property upon which work is being performed is not applicable. We reject that argument. The plain meaning of the language covers the situation here. **Vandivort was performing operations on the property and the injury here for which damages claimed arose out of those operations.**[113]

As stated, the rule in Vandivort has only to do with the extent of a contractor's operations, not with what is or is not "that particular part" of a completed construction project.

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[113] Id. at 308 (emphasis added).

Third, the ISO circular in the record[114] clearly defines the limited scope of the "that particular part" exclusion and undermines MOE's position.[115] In this same vein, the Schwindt case MOE relies upon involved a Lloyd's of London form, not the ISO-equivalent form used by MOE. The Schwindt court specifically noted there was no evidence in the record before it that London intended what ISO intended,[116] a situation distinguishable from the case at bar because, unlike Lloyd's of London, MOE *is* a company which follows ISO's intent.

The ISO circular provides examples of the limited scope of the "that particular part" exclusion, all of which are contrary to MOE's interpretation. Specifically, the ISO circular utilizes the following examples:

An insured subcontractor is erecting steel beams. Having erected four beams, the contractor is in the process of erecting a fifth beam when the fifth beam falls, damaging all five beams. "That particular part" of the property would be limited to the fifth beam.
An electrical contractor installs a switch. The contractor damages the switch which results in the burning out of the electrical system. Only the switch would be deemed "that particular part" of the property.

[114] CP 249 – 257.

[115] It is undisputed that MOE subscribes to ISO and interprets its policies consistent with ISO intent. (CP 406 at ln. 6 – 11.)

[116] Schwindt, 81 Wn. App. at 305.

Contractor replaces relief valve on a pressure vessel. As he is testing the vessel, it burst because the relief valve does not function. This occurrence is covered with respect to the pressure vessel. Only the valve ("that particular part") is excluded.
Painter is burning paint off a house with a torch and sets fire to the house. Covered except for "that particular part" to which the torch was applied.
Serviceman working on television in owner's home blows out picture tube while tinkering with another tube, or tips set over damaging other parts. Covered since picture tube or other parts are not "that particular part" on which operation [sic] are being performed.

Here, there is undisputed evidence in the record that the particular part of the property which must be repaired was limited to the seams and flashing of the EIFS siding on the Hedges' residence. MOE, on the other hand, will likely make a sweeping and unsupported generalization that the entire finished residence was "that particular part." This Court should reject MOE's arguments in light of the examples in the ISO circular.

E. THE "REPAIR OR REPLACEMENT" EXCLUSION DOES NOT APPLY AS A MATTER OF LAW

MOE may also claim an exclusion in the UMB 3011 endorsement known as the "repair or replacement" exclusion also applies to bar coverage. The exclusion reads as follows:

> The exclusions of this policy related to Property Damage are replaced by the following exclusion:
>
> A) To property damage

2) Except with respect to liability under a written sidetrack agreement or the use of elevators

(d) That particular part of any property, not on premises owned by or rented to the Insured.

3) The restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship **thereon** by or on behalf of the Insured...[117]

As the exclusion's language makes clear, the very purpose of the "that particular part" language of the exclusion is to limit application of the exclusion to only the repair cost of the defect – not to any resulting damage. There is no evidence in the record showing the repair of framing and sheathing was made necessary by reason of fault workmanship "*thereon*." Stated another way, there is no evidence that the framing and sheathing had to be replaced because it was itself faulty, or that it was installed in a faulty fashion. To the contrary, the framing and sheathing had to be replaced because the EIFS seams were improperly installed. Absent such evidence, there is no basis to apply the "repair or replacement" exclusion to bar coverage for the arbitration award.

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[117] CP 531 (emphasis added).

F. THE TRIAL COURT ERRED WHEN IT FAILED TO AWARD MACPHERSON, LLC THE FULL AMOUNT OF ATTORNEY'S FEES AND OTHER COSTS OF LITIGATION INCURRED IN LITIGATING TO OBTAIN THE BENEFIT OF THE INSURANCE COVERAGE MOE PROVIDED

The trial court proceedings commenced when MoE sued MacPherson, LLC in an attempt to obtain a judicial declaration that the policy it issued MacPherson, LLC did not cover the underlying arbitration award. After significant litigation activity, MacPherson, LLC prevailed. The trial court, however, only awarded MacPherson, LLC approximately 26% of the fees and costs incurred in prevailing on the issue of coverage. Should this Court affirm the trial court's ultimate ruling of coverage on any basis, Washington law requires a full award of fees and costs to MacPherson, LLC.

In Washington, when an insurer forces its policyholder to litigate to obtain insurance benefits, the court must award the policyholder its reasonable attorneys' fees and costs incurred in the lawsuit.[118] To effect the policy underlying the decision in Olympic Steamship, the fee award must make the policyholder whole.

1. The Olympic Steamship Fee Award Is Obligatory And Must Make The Policyholder Whole

The prevailing party in a lawsuit is typically responsible for its own attorney's fees and costs related to a lawsuit. Under this

[118] Olympic Steamship v. Centennial Insurance, 117 Wn.2d 37, 53, 811 P.2d 673 (1991).

American Rule, "attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity."[119] Washington recognizes the policyholder-insurer relationship as one important ground in equity justifying the award of fees to a prevailing party. To that end, under Olympic Steamship, the award of attorneys' fees is "**required** in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain the full benefit of his insurance contract,. . . ."[120]

The "principle premise" for the compulsory award of fees to prevailing policyholder litigants is because the "disparity of bargaining power between an insurance company and its policyholder makes the insurance contract substantially different from other commercial contracts."[121] The insurance contract creates a "special fiduciary relationship" that between an insurer and its policyholder.[122] Because of this "special fiduciary duty" the insurer is prohibited "from engaging in any action which would demonstrate a greater concern for the

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[119] McGreevy v. Oregon Mutual, 128 Wn.2d 26, 35, 904 P.2d 731 (1995) at n. 8 (citing Philip A. Talmadge, *The award of Attorneys' Fees in Civil Litigation in Washington*, 16 Gonz. L. Rev. 57 (1980)).

[120] Olympic Steamship, 117 Wn.2d 37, 53, 811 P.2d 673 (1991) (emphasis added).

[121] Olympic Steamship, 117 Wn.2d at 52.

[122] McGreevy, 128 Wn.2d at 36.

insurer's monetary interest that for the insured's financial risk."[123] Therefore:

> [W]hen an insurer unsuccessfully contests coverage, it has placed its interests above the insured. Our decision in Olympic Steamship remedies this inequity by **requiring that the insured be made whole**."[124]

The Olympic Steamship fee award is an obligatory remedial measure and the insured "**must** be put in as good a position as he or she would have been in had the contract not been breached."[125] A policyholder purchases insurance for "protection from expenses arising from litigation, not 'vexatious, time-consuming, expensive litigation with his insurer.'"[126] The purpose of the fee award is "to make an insured whole when he is forced to bring a lawsuit to obtain the benefit of his bargain with an insurer."[127]

2. The Partial Fee Award By The Trial Court Failed To Make MacPherson, LLC Whole And Is Reversible Error

MacPherson, LLC prevailed in the lawsuit and the trial court ultimately found that MacPherson, LLC was entitled to approximately

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123 Tank v. State Farm Fire & Casualty Co., 105 Wn.2d 381, 388, 715 P.2d 1133 (1986).

124 McGreevy, 128 Wn.2d at 39-40 (emphasis added).

125 Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 138, 29 P.3d 777 (2001) (emphasis added).

126 Id.

127 Panorama Village v. Allstate, 144 Wn.2d 130, 144, 26 P.3d 910 (2001).

$400,000 in insurance benefits.[128] MacPherson, LLC paid $165,900.75 in legal fees and costs to obtain this result.[129] Under Olympic Steamship, MacPherson, LLC is entitled to an award of attorneys' fees and costs sufficient to make it whole. The trial court, however, only awarded MacPherson, LLC $43,447.88. The trial court's partial fee award did not make MacPherson, LLC whole. MacPherson, LLC has not received the benefit of the bargain it is entitled to and it has not been "made whole." The Olympic Steamship fee award is supposed to remedy this inequity.

Declarations filed in support of each firms' fee invoices attest that all fees were directly related to MacPherson, LLC's representation in the declaratory judgment action filed by MoE.[130] If MoE had recognized and honored the Liberalization Clause on its own accord, MacPherson, LLC would not have incurred the substantial legal fees that it did. All of the legal fees incurred were necessary defend against MoE's own lawsuit, to establish coverage and ultimately to arrive at the final successful result.

The trial court's failure to make MacPherson, LLC whole violates the purpose and policy behind the Olympic Steamship rule.

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[128] CP 1588.

[129] CP 1281, 1309.

[130] CP 1299; CP 1323; CP 1336-37; CP 1371-72.

MacPherson, LLC respectfully requests that this Court award the full fees and costs incurred or remand the case for determination of a fee award to MacPherson, LLC for the full amount of fees and costs incurred.

3. The Trial Court Erred In Adopting A Miscalculated And Inaccurate Fee Award

When the trial court exercises its discretion to reduce a fee award, it is required to take the entire fee award and then reduce that amount for fees related to any unsuccessful legal theories pursued. The trial court in this matter awarded MacPherson, LLC fees in the same amount as argued by MoE as solely related to the successful August summary judgment motion.

MacPherson, LLC acknowledges that Washington law allows for the reduction of a fee award for time spent pursuing unsuccessful legal theories.[131] However, like any mathematical calculation, the order in which the calculation is done is critical to obtaining a correct result. The trial court erred by adopting and thereby sanctioning the incorrectly performed the calculation.

Under the proper calculation of an Olympic Steamship fee award the court is to start with the requested hours, and then exclude hours pertaining to unsuccessful claims or duplicative work. The

[131] Bowers v. Transamerica Title Ins., 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

proper fee award requires the court "exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims."[132] The court "should therefore discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time."[133]

To perform the calculation in reverse, or to simply take the opposing party's unilateral summation of the fees it believes were related to the successful claims, is inappropriate, violates the lodestar method, and results in an inadequate fee award.

The trial court's findings of fact and conclusions of law do not indicate how it arrived at the final fee award of $43,447.88. However, this is the exact figure proposed by MoE in its surreply to MacPherson, LLC's Motion for Entry of Judgment and Petition for Award of Attorney's Fees and Other Costs of Litigation.[134] In the surreply, MoE indicates that its calculation of the fee award requires that each fee entry be "shown to be at least peripherally associated with MacPherson, LLC's successful outcome."[135] This indicates that MoE started with zero hours and then arguable looked for hours it felt necessary to the successful August 2005 motion.

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[132] Mahler v. Szucs, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

[133] Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

[134] CP 1522.

[135] CP 1518.

This methodology, as performed by MoE and ostensibly adopted and sanctioned by the trial court, impermissibly alters the burden on the prevailing policyholder litigant in its pursuit of legal fees and costs. This method fails to account for legal work necessary and attendant to the litigation as a whole. This is especially true as MacPherson, LLC was the defendant and was forced to defend against the suit and at the same time pursue its rightful insurance benefits.

The only unsuccessful legal theory pursued in this matter was the January 2005 summary judgment motion. The court should have taken the entire amount of fees MacPherson incurred in the coverage action, and then simply deducted fees solely related to the unsuccessful January motion. Instead, the trial court did the opposite and only awarded fees arguably identified by MoE as related to the successful August summary judgment motion. This *unilateral summation*, rather than the requisite *reasonable reduction*, is reversible error.

In Eagle Point v. Coy,[136] the trial court awarded discretionary attorneys fees to a successful plaintiff under the Washington Condominium Act. The court held that:

To withstand appeal, a fee award **must** be accompanied

[136] 102 Wn. App. 697, 9 P.3d 898 (2000).

> by findings of fact and conclusions of law to establish a record adequate for review. On this topic the court's findings and conclusions in this case are entirely conclusory. The appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds. Following Mahler, we vacate the award of attorney fees and remand for entry of findings and conclusions to explain how the court arrived at the figure of $25,000.[137]

Like Eagle Point, the conclusory ruling in this matter will not allow this Court to property determine whether the trial court followed its mandate to make the policyholder whole, and whether the lodestar calculations were property performed. As such, MacPherson, LLC respectfully requests this Court remand the fee award back to the trial court for the proper, detailed, lodestar fee calculation.

G. REQUEST FOR ATTORNEY FEES UNDER RAP 18.1

In compliance with RAP 18.1(b), should this Court affirm the trial court ruling in favor of MacPherson, LLC on any ground (either by reversing the summary judgment ruling which MacPherson, LLC lost or by affirming the summary judgment ruling MacPherson, LLC prevailed on), MacPherson, LLC will be entitled to its attorney fees and other costs and expenses of litigation in the trial court and on appeal

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[137] Id. (emphasis added).

under Olympic Steamship, Inc. v. Centennial Insurance Company[138] and other applicable law and statute.

IX. CONCLUSION

For the foregoing reasons, MacPherson, LLC respectfully requests that this Court reverse the decision of the trial court and enter judgment in MacPherson, LLC's favor on the issue of coverage under the umbrella supplement contained in the MoE Policy. Additionally, MacPherson, LLC requests that this Court remand the proceedings for recalculation of the award of attorney's fees and costs to MacPherson, LLC as required by applicable law.

DATED this 25TH day of July, 2006.

THE HARPER FIRM, PLLC

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[138] Olympic Steamship, Inc. v. Centennial Insurance Company, 117 Wn.2d 37, 811 P.2d 673 (1991).

CERTIFICATE OF SERVICE

The undersigned certifies that on *Tuesday, July 25, 2006*, I caused a true and correct copy of this document to be delivered in the manner indicated to the following parties:

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DATED this 25th day of July, 2006.

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